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In re Application of :  
Robert I. Nurse : DECISION ON PETITION  
Application No. 09/755,408 :  
Filed: January 5, 2001 :  
Attorney Docket No. 7903M :

This is a decision on the petition filed on February 26, 2004 by which petitioner requests withdrawal of the abandoned status of this application. A Notice of Abandonment has not been mailed. However, it appears that the application stands abandoned for failure to timely file a proper reply to the final Office action dated August 5, 2003. The petition is being considered pursuant to 37 CFR 1.181, and no fee for the petition is required.

The petition is dismissed.

Petitioner alleges that a reply to the Office action in question, a final rejection, was in fact timely filed on October 9, 2003, but was not properly entered in the record, but was never acted upon. Apparently, petitioner takes the position the response placed the application in condition for allowance, and requests that the application be processed to issue.

It appears from the record that a reply to the final Office action was facsimile transmitted to the Office on October 6, 2003, but received no action. The record also shows that a copy of the reply was filed on February 26, 2004. Both the originally filed reply and the copy of the reply to the Office action in question have been associated with the application file. As noted, the reply is entitled to a 37 CFR 1.8(a) certificate date of October 6, 2003, making the reply timely. However, under 37 CFR 1.113 and 1.116, only certain replies to a final Office action are considered to be a **proper** reply to a final rejection. Therefore, the reply has been forwarded to the examiner for consideration as to whether the reply filed on considered the reply filed on October 6, 2003 was proper under the above mentioned regulations. The examiner reports that the reply does not place the application in condition for allowance because the newly proposed limitations in claims 1 raise a question of new matter as to whether upstanding strut 42 is "articulably" connected to the sidewall according to the original application disclosure. The examiner is also of the opinion that even aside from that issue, the proposed amendment would not, *prima facie*, place the application in condition for allowance over the prior art Artusi reference.

Petitioner was under an obligation imposed by 37 CFR 1.113 and 1.116 to file a proper reply to the final within the meaning of these regulations. Petitioner had, therefore, a duty to monitor the status of the application and the status of the reply that was filed, and to make inquiries as necessary regarding the reply and the application. Ultimately, even in the absence of any information regarding the reply, petitioner had a duty to file a timely reply that was in compliance with the regulations in order to forestall abandonment. As stated in MPEP § 711.03(c):

"Evidence of nonreceipt of an Office communication or action (e.g. Notice of Abandonment or an advisory action) other than that action to which reply was required to avoid abandonment would not warrant withdrawal of the holding of abandonment." (Emphasis supplied.)

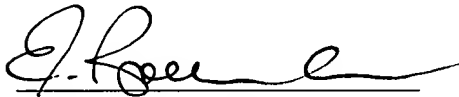
In this instance, it appears that abandonment has resulted from the failure to file a reply meeting the requirements of 37 CFR 1.113 and 1.116, coupled with the failure to monitor the status of the application so as to take action appropriate under these regulations prior to the expiration of the maximum time permitted by 35 USC § 133 for doing so. In the absence of the filing a reply as required by 37 CFR 1.113 and 1.116, the application has been properly held to have become abandoned under 35 USC § 133 for failure to file a timely and proper reply to the final rejection.

For the foregoing reasons, it appears that there was no error on the part of the Office in holding that this application has become abandoned. It further appears that petitioner's remedy is to proceed pursuant to 37 CFR 1.137. However, petitioner is entitled to file a request for reconsideration of this decision, without

fee, provided that such request is filed within two months of the date of this Decision. See 37 CFR 1.181(f).

The file is being forwarded to the attention of the Supervisory Patent Examiner of Art Unit 3727 to have a Notice of Abandonment mailed in this application.

PETITION DISMISSED.

A handwritten signature in cursive script, appearing to read 'E. Rollins-Cross', written over a horizontal line.

E. Rollins-Cross, Director  
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